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BUREAU OF LAW

MEMORANDUM

TO: State Tax Commission

FROM: E. H. Best, Counsel

SUBJECT: Mutual Life Insurance Company
Formal Determinations - Franchise
Taxes - Section 187, Subdivision 2

Enclosed herein are one original and three copies each of a proposed determination for taxable periods ended September 30, 1964 and a proposed decision for taxable periods ended March 31, 1966, both holding that the cost of providing insurance by the taxpayer, a domestic life insurance corporation to its employees constitutes a taxable premium within the intent and meaning of subdivision 2 of section 187 of Article 9 of the Tax Law.

The facts disclose that the taxpayer, which is in the business of providing life insurance and accident and health insurance, provides such insurance to its own employees and its agents, called field underwriters, at reduced costs in which the normal profit, ordinarily added to premiums, is not included. A portion of such costs is borne by the employees by means of contributions. The contributions are made by deducting certain amounts from salary. The remaining portion is borne as a cost by the taxpayer. The taxpayer has never reported nor been required to report such insurance policies for review to the Superintendent of Insurance, even though such policies are conceded by the taxpayer to be insurance contracts. The taxpayer has never reported the cost of insurance, either with respect to employees' contributions or its own contributions as premiums in the Annual Statement required to be filed with the Superintendent of Insurance or in the quarterly tax returns. Such failure to include any portion of the costs of insurance to its employees as premium was sanctioned and approved both by the Insurance Department and by the Corporation Tax Bureau. However, in an opinion dated 1960, a copy of which is attached to the stipulation of facts, the Attorney General held that the cost of insurance is a taxable premium under section 187 of the Tax Law. Based upon such opinion, assessments were issued imposing additional taxes. The taxes have been paid and refunds have now been applied for.

I am of the opinion that the Attorney General's opinion must be followed and that the determinations proposed herein have been prepared to deny the refunds requested.

One of the arguments made by the attorney for the taxpayer in his memorandum of law, a copy of which is hereto submitted, is that the Attorney General's opinion is contrary to the long standing opinion of both the Superintendent of Insurance and the Corporation Tax Bureau that the cost of such insurance to the employees by the taxpayer is not a taxable premium. This argument was destroyed by the court in the case of Inter-County Title and Mortgage Guarantee Company v. State Tax Commission, 33 A D 2d 231, in which the court determined that certain fees paid in consideration of the issuance of title insurance policies were taxable premiums despite the fact that the Superintendent of Insurance had always previously determined otherwise.


Another argument is that the Attorney General's opinion is incorrect in that the policies, even though standard insurance contracts, are issued not as insurance but under the provisions of the Insurance Law pertaining to employee benefits. The thrust of the argument is that the taxpayer should be placed in the position of a corporation which is not in the insurance business but one that issues benefits for its employees. The attorney for the taxpayer cites certain decisions in other states with respect to insurance and premium reserve taxes - State Tax Comm. v. John Hancock Mut. Life Ins. Co., 341 Mass. 555, 190 N.E. 2d 711 (1960); California-Western States Life Ins. Co. v. State Bd. of Equalization, et al., 151 Cal. App. 2d 559, 312 P. 2d 19 (1957); Albert Williams, Commissioner of Insurance and Banking for the State of Tennessee v. Massachusetts Mutual Life Ins. Co., (Sup. Ct. Tenn., May 3, 1968) - to the effect that costs of insurance to its employees do not create taxable premiums or taxable reserves. Although these cases appear to hold that the costs to the employer-insurance company are not taxable, the cases clearly hold that the employees' contributions are taxable premiums and enter into the computation of taxable reserve. The taxpayer, although having applied for a refund of the entire cost of providing insurance to its employees does not present any argument to show that the portion contributed by the employees is not a taxable premium. In fact, it appears clear from the cases, from the Attorney General's opinion and subsequent 1966 opinion, a copy of which is attached to the submitted memorandum of law that at the very least, the employees' contributions are taxable premiums within the intent and meaning of section 187, subdivision 2 of the Tax Law. The taxpayer contends however that such opinion supports its argument that the costs born by the employer are not taxable premiums.

Nevertheless, in view of the Attorney General's opinion which holds that the contributions borne by the taxpayer to be premiums, I believe that the entire assessment should be sustained and refunds be denied.

If you agree, kindly sign one original and three copies of the proposed decision and the proposed determination and return the same to the Law Bureau together with the file for further processing.

Counsel

Enc.
MS:nn/gg
July 6, 1970



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

**THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK**

**for a refund of franchise taxes
assessed under Section 187, sub-
division 2, of Article 9 of the
Tax Law for the quarterly period
ended December 31, 1964 and for
all quarterly periods thereafter
through the period ended March 31,
1966**

The Mutual Life Insurance Company of New York, the taxpayer herein, having duly filed a petition for refund of franchise taxes assessed under Section 187, Subdivision 2, of Article 9 of the Tax Law for the quarterly period ended December 31, 1964 and for all quarterly periods thereafter through the period ended March 31, 1966, and a stipulation of facts in lieu of a hearing having been executed between the State Tax Commission and the taxpayer, a copy of which stipulation is hereto annexed and made a part hereof, together with all the exhibits attached thereto;

The State Tax Commission hereby finds:

1. The taxpayer, The Mutual Life Insurance Company of New York, is and was for all the periods mentioned herein and prior thereto, a domestic life insurance corporation authorized and licensed to do an insurance business specified in paragraphs 1, 2 and 3 of Section 46 of the Insurance Law in New York and in the District of Columbia, Puerto Rico, Canada and foreign countries. The kinds of business which the taxpayer is authorized to do and which it is presently doing are life insurance, annuities and accident and health insurance.

2. That during the year 1965, and since the year 1946, the taxpayer has provided its employees with certain life insurance and accident and health insurance, including benefits payable upon death, illness and disability, and for medical expenses. For at least a substantial part of the same period, the taxpayer provided similar benefits for its agents (hereinafter referred to as "field underwriters"). As appears in exhibits attached hereto, medical expense benefits payable to its employees and field underwriters could be obtained to cover expenses incurred by the employees' dependents, at additional cost to such employees and field underwriters. In addition, during the period between 1926 and 1946, Mutual of New York provided its employees with life insurance in the form of a benefit payable upon death and accident and health insurance in the form of benefits payable upon total disability.

3. Said insurance benefits provided to its employees were provided under a plan of insurance adopted in 1946 and designated "Security Plan for the Employees of Mutual Life Insurance Company". Said plan, which was amended from time to time, has been summarized or set forth in booklets published at various times and are attached hereto as Exhibits "E" and "F".

4. Said insurance benefits provided to its field underwriters who are licensed to sell life, health and accident insurance to members of the public were provided under a plan adopted in 1958 which plan had been amended from time to time. The terms of such plan are set forth or summarized in plan booklets, herein attached as Exhibits "G" and "H".

5. That although said original plans for the benefits of its employees and field underwriters and the amendments made thereto from time to time have been submitted and approved by the Superintendent of Insurance under Section 214 of the Insurance Law which regulates benefits primarily for employees of domestic life insurance companies and Section 213 of said law which regulates agents'

benefits and other expenses of life insurance companies, said plans were never submitted to nor approved by the Superintendent of Insurance as insurance policies to be delivered or to be issued for delivery in New York under the provisions of Section 154 of the Insurance Law. Such plans do, however, involve contractual obligations on the part of the taxpayer of such a nature that they constitute insurance contracts.

6. Part of the total cost of providing insurance benefits is borne by the taxpayer and part is contributed by its employees and field underwriters by means of periodic withholding of deductions from their compensation. The computation of costs for the aforesaid insurance benefits does not include any amounts attributable to general surplus although such amounts are included in the charge for such commercially sold insurance. The operation of the plan for said benefits can and does produce each year a surplus or a deficit, depending on the relation of the actual experience to the assumptions underlying the original cost calculations.

7. The taxpayer is required to file and did during the periods involved file with the Superintendent of Insurance an Annual Statement setting forth therein certain information regarding premiums received in the exercise of its franchise as an authorized insurer and including therein certain information regarding benefits of its employees and agents. Pertinent abstracts of said Annual Statement is set forth as Exhibit "B".

8. The taxpayer was required to file and did file with the State Tax Commission quarterly tax returns setting forth therein facts pertaining to the determination of the premium tax due under Section 187, Subdivision 2, of the Tax Law for the preceding quarter. See Exhibit "C".

9. The taxpayer was also required to file and did file annually with the State Tax Commission and the Superintendent of Insurance a Reconciliation Statement (Exhibit "D") reconciling the

total amount of taxable premiums due for a calendar year as shown in the four quarterly returns which were filed for such calendar year, with the total taxable premiums shown in the company's Annual Statement for such calendar year.

10. None of the costs which are borne by the taxpayer, nor any of the contributions by its employees and field underwriters for providing such insurance benefits for the years in issue and prior thereto have been included as premiums in the income statement of the taxpayer's Annual Statement filed with the Superintendent of Insurance nor included in the quarterly tax returns filed with the State Tax Commission. However, said costs and contributions have been shown as income in the Summary of Operations in the Annual Statement and in the Analysis of Operations in such Annual Statement.

11. The amount of contributions by employees and field underwriters for accident and health insurance for the quarterly periods considered herein, which contributions were not reported as premiums in the quarterly returns as set forth above, total \$379,068.00. The amount of contributions by employees and field underwriters for life insurance for such periods, which contributions were not reported as premiums in the quarterly returns as set forth above, total \$50,241.00.

12. The costs borne by the employer for the issuance of accident and health insurance contracts for such periods, which costs were not reported as premiums in the quarterly returns as set forth above, total \$540,454.00. The costs borne by the employer for the issuance of life insurance contracts for such periods, which costs were not reported as premiums in the quarterly returns as set forth above, total \$566,729.00.

13. Based upon an opinion of the Attorney General of the State of New York, dated February 17, 1960, the State Tax Commission computed the amount of \$30,404.73 to be due and owing by the tax-

payer as additional franchise taxes and interest for the periods considered herein. Such taxes comprise taxes and interest in the total amount of \$8,795.55 for such periods based upon contributions by employees and field underwriters, and taxes and interest in the total amount of \$30,404.73 based upon the costs borne by the taxpayer for the aforesaid periods. Such assessed taxes have been paid by the taxpayer and a claim for refund was duly filed. Said claim for refund has been denied by the State Tax Commission and a petition for refund of such taxes has been filed in accordance with the provisions of Article 27 of the Tax Law.

Based upon the entire record, including the stipulation of facts and exhibits attached thereto, the State Tax Commission hereby

(A) That the portion of the costs for insurance which have been contributed by the employees and the agents of the taxpayer, in the amounts set forth in finding of fact No. 11, were given by such employees and agents, to the taxpayer, in consideration for the issuance of policies of insurance, and are taxable premiums within the intent and meaning of Section 187 of the Tax Law.

(B) That the portion of the costs of insurance which have been borne by the taxpayer, in the amounts set forth in finding of fact No. 12, have, in effect, been contributed by the taxpayer on behalf of its employees and agents in consideration by them for the issuance of the aforesaid insurance policies, and are taxable premiums within the intent and meaning of Section 187 of the Tax Law.

(C) That the benefits to its employees or agents were given in accordance with contracts of insurance executed between the taxpayer and its employees or agents; that the taxpayer has failed to establish that any substantial difference exists between insurance contracts made to its employees and agents, and contracts to the

taxpayer's customers in the regular course of the taxpayer's business; that the total of both the contributions by the employees and agents of the taxpayer and the portion of the costs which were borne by the taxpayer constitute taxable premiums pursuant to the provisions of Section 187 of the Tax Law and cannot be distinguished from any other premiums received by the taxpayer in the conduct of its business and reportable by it as taxable premiums under such law.

(D) That accordingly, the taxes assessed as set forth in finding of fact No. 13 and paid by the taxpayer are correct, and no refund of taxes are lawfully due and owing.

Dated: This 21st day of July, 1970.

STATE TAX COMMISSION

/s/ Norman Gallman

ACTING PRESIDENT

/s/ A. Bruce Manley

COMMISSIONER

/s/ Milton Koerner

COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application

of

**THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK**

**for a refund of franchise taxes assessed
under Section 157, subdivision 2, of
Article 9 of the Tax Law for the quarterly
period ended March 31, 1959 and for all
quarterly periods thereafter through the
period ended September 30, 1964**

The Mutual Life Insurance Company of New York, the taxpayer herein, having duly filed an application for refund of franchise taxes assessed under Section 157, Subdivision 2, of Article 9 of the Tax Law for the quarterly period ended March 31, 1959 and for all quarterly periods thereafter through the period ended September 30, 1964, and a stipulation of facts in lieu of a hearing having been executed between the State Tax Commission and the taxpayer, a copy of which stipulation is hereto annexed and made a part hereof, together with all the exhibits attached thereto;

The State Tax Commission hereby finds:

1. The taxpayer, The Mutual Life Insurance Company of New York, is and was for all the periods mentioned herein and prior thereto, a domestic life insurance corporation authorized and licensed to do an insurance business specified in paragraphs 1, 2 and 3 of Section 46 of the Insurance Law in New York and in the District of Columbia, Puerto Rico, Canada and foreign countries. The kinds of business which the taxpayer is authorized to do and which it is presently doing are life insurance, annuities and accident and health insurance.

2. That during the year 1965, and since the year 1946, the taxpayer has provided its employees with certain life insurance and accident and health insurance, including benefits payable upon death, illness and disability, and for medical expenses. For at least a substantial part of the same period, the taxpayer provided similar benefits for its agents (hereinafter referred to as "field underwriters"). As appears in exhibits attached hereto, medical expense benefits payable to its employees and field underwriters could be obtained to cover expenses incurred by the employees' dependents, at additional cost to such employees and field underwriters. In addition, during the period between 1936 and 1946, Mutual of New York provided its employees with life insurance in the form of a benefit payable upon death and accident and health insurance in the form of benefits payable upon total disability.

3. Said insurance benefits provided to its employees were provided under a plan of insurance adopted in 1946 and designated "Security Plan for the Employees of Mutual Life Insurance Company". Said plan, which was amended from time to time, has been summarized or set forth in booklets published at various times and are attached hereto as Exhibits "E" and "F".

4. Said insurance benefits provided to its field underwriters who are licensed to sell life, health and accident insurance to members of the public were provided under a plan adopted in 1958 which plan had been amended from time to time. The terms of such plan are set forth or summarized in plan booklets, herein attached as Exhibits "G" and "H".

5. That although said original plans for the benefits of its employees and field underwriters and the amendments made thereto from time to time have been submitted and approved by the Superintendent of Insurance under Section 214 of the Insurance

Law which regulates benefits primarily for employees of domestic life insurance companies and Section 213 of said law which regulates agents' benefits and other expenses of life insurance companies, said plans were never submitted to nor approved by the Superintendent of Insurance as insurance policies to be delivered or to be issued for delivery in New York under the provisions of Section 154 of the Insurance Law. Such plans do, however, involve contractual obligations on the part of the taxpayer of such a nature that they constitute insurance contracts.

6. Part of the total cost of providing insurance benefits is borne by the taxpayer and part is contributed by its employees and field underwriters by means of periodic withholding of deductions from their compensation. The computation of costs for the aforesaid insurance benefits does not include any amounts attributable to general surplus although such amounts are included in the charge for such commercially sold insurance. The operation of the plan for said benefits can and does produce each year a surplus or a deficit, depending on the relation of the actual experience to the assumptions underlying the original cost calculations.

7. The taxpayer is required to file and did during the periods involved file with the Superintendent of Insurance an Annual Statement setting forth therein certain information regarding premiums received in the exercise of its franchise as an authorized insurer and including therein certain information regarding benefits of its employees and agents. Pertinent abstracts of said Annual Statement is set forth as Exhibit "B".

8. The taxpayer was required to file and did file with the State Tax Commission quarterly tax returns setting forth therein facts pertaining to the determination of the premium tax due under Section 157, Subdivision 2, of the Tax Law for the preceding quarter. See Exhibit "C".

9. The taxpayer was also required to file and did file annually with the State Tax Commission and the Superintendent of Insurance a Reconciliation Statement (Exhibit "D" reconciling the total amount of taxable premiums due for a calendar year as shown in the four quarterly returns which were filed for such calendar year, with the total taxable premiums shown in the company's Annual Statement for such calendar year.

10. None of the costs which are borne by the taxpayer, nor any of the contributions by its employees and field underwriters for providing such insurance benefits for the years in issue and prior thereto have been included as premiums in the income statement of the taxpayer's Annual Statement filed with the Superintendent of Insurance nor included in the quarterly tax returns filed with the State Tax Commission. However, said costs and contributions have been shown as income in the Summary of Operations in the Annual Statement and the Analysis of Operations in such Annual Statement.

11. The amount of contributions by employees and field underwriters for accident and health insurance for the quarterly periods considered herein, which contributions were not reported as premiums in the quarterly returns as set forth above, total \$1,195,700.00. The amount of contributions by employees and field underwriters for life insurance for such periods, which contributions were not reported as premiums in the quarterly returns as set forth above, total \$140,734.00.

12. The costs borne by the employer for the issuance of accident and health insurance contracts for such periods, which costs were not reported as premiums in the quarterly returns as set forth above, total \$2,050,514.00. The costs borne by the employer for the issuance of life insurance contracts for such periods, which costs were not reported as premiums in the quarterly returns as set forth above, total \$1,736,089.00.

13. Based upon an opinion of the Attorney General of the State of New York, dated February 17, 1960, the State Tax Commission computed the amount of \$122,126.39 as additional franchise taxes and interest due and owing by the taxpayer for the periods considered herein. Such taxes comprise taxes and interest in the total amount of \$33,078.03 for such periods based upon contributions by employees and field underwriters, and taxes and interest in the total amount of \$89,048.36 based upon the costs borne by the taxpayer for the aforesaid periods. Such assessed taxes have been paid by the taxpayer and an application for refund has been duly filed in accordance with the provisions of Section 198 of Article 9 of the Tax Law.

Based upon the entire record, including the stipulation of facts and exhibits attached thereto, the State Tax Commission hereby

DETERMINES:

(A) That the portion of the costs for insurance which have been contributed by the employees and the agents of the taxpayer, in the amounts set forth in finding of fact No. 11, were given by such employees and agents, to the taxpayer, in consideration for the issuance of policies of insurance, and are taxable premiums within the intent and meaning of Section 187 of the Tax Law.

(B) That the portion of the costs of insurance which have been borne by the taxpayer, in the amounts set forth in finding of fact No. 12, have, in effect, been contributed by the taxpayer on behalf of its employees and agents in consideration by them for the issuance of the aforesaid insurance policies, and are taxable premiums within the intent and meaning of Section 187 of the Tax Law.

(C) That the benefits to its employees or agents were given in accordance with contracts of insurance executed between the taxpayer and its employees or agents; that the taxpayer has

failed to establish that any substantial difference exists between insurance contracts made to its employees and agents, and contracts to the taxpayer's customers in the regular course of the taxpayer's business; that the total of both the contributions by the employees and agents of the taxpayer and the portion of the costs which were borne by the taxpayer constitute taxable premiums pursuant to the provisions of Section 157 of the Tax Law and cannot be distinguished from any other premiums received by the taxpayer in the conduct of its business and reportable by it as taxable premiums under such law.

(D) That accordingly, the taxes assessed as set forth in finding of fact No. 13 and paid by the taxpayer are correct, and no refund of taxes are lawfully due and owing.

Dated: This 21st day of July , 1970.

STATE TAX COMMISSION

/s/ Norman Gallman
ACTING PRESIDENT

/s/ A. Bruce Manley
COMMISSIONER

/s/ Milton Koerner
COMMISSIONER